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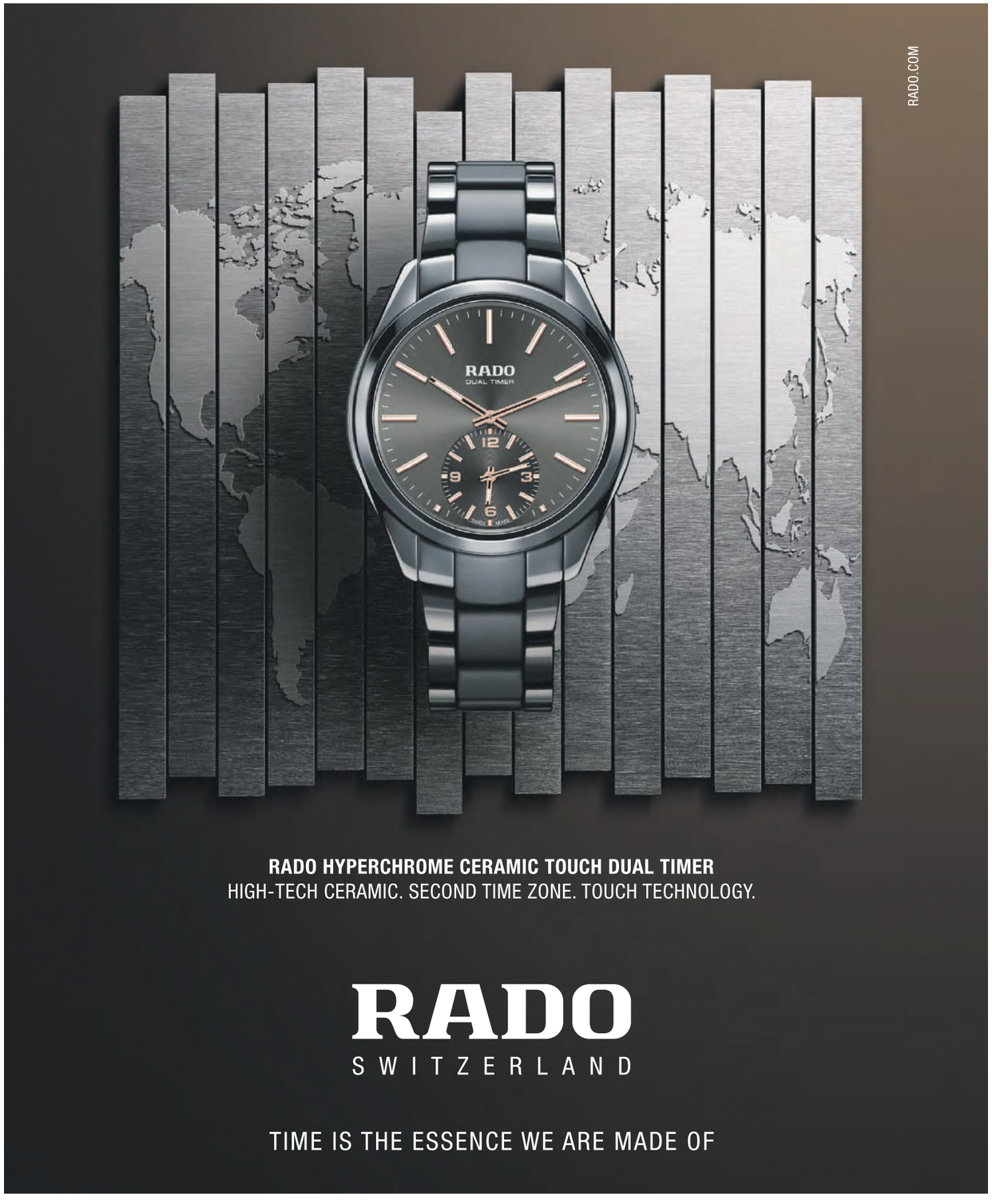
RID ME OF DRINKERS

Bihar's prohibition law was cited by Chief Justice Ramana as an example of "lack of foresight" in drafting legislation. Legislating should be handled with care after proper scrutiny of its constitutionality and assessment of impact on the judicial system

VISIT…



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Published by Prof Baldev Raj Gupta on behalf of E N Communications Pvt Ltd and printed at Vijaylakshmi Printing Works Pvt. Ltd. B.117, Sector-V, Noida GSTIN/UIN: 09AABCV7028F1ZA, State: Uttar Pradesh, Code: 09
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OWNED BY E. N. COMMUNICATIONS PVT. LTD.
A -9, Sector-68, Gautam Buddh Nagar, NOIDA (U.P.) - 201309
Phone: +9 1-0120-2471400- 6127900 ; Fax: + 91- 0120-2471411
e-mail: editor@indialegalonline.com
website: www.indialegallive.com
MUMBAI: Arshie Complex, B-3 & B4, Yari Road, Versova, Andheri, Mumbai-400058
RANCHI: House No. 130/C, Vidyalaya Marg, Ashoknagar, Ranchi-834002.
LUCKNOW: First floor, 21/32, A, West View, Tilak Marg, Hazratganj, Lucknow-226001.
PATNA: Sukh Vihar Apartment, West Boring Canal Road, New Punaichak, Opposite Lalita Hotel, Patna-800023.
ALLAHABAD: Leader Press, 9-A, Edmonston Road, Civil Lines, Allahabad-211 001.

JANUARY 17, 2022

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Cover Design: AMITAVA SEN
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CJI Ramana bids farewell to Supreme Court judge R Subhash Reddy

While bidding farewell to Supreme Court judge, R Subhash Reddy, who retired on January 4, Chief Justice of India NV Ramana said that Justice Reddy was also born into an agricultural family like him and his journey as a legal professional was marked by many milestones. Justice Reddy was the first judge from Telangana to become an apex court judge after the new state came into being.

The CJI said: "I remember him as a young lawyer. He used to run from one court to another because of the volume of his work. He practised for 22 years at tribunals, civil courts, the Andhra Pradesh High Court and also before the Supreme Court in matters related to civil, criminal, constitutional, revenue, taxation, labour, company and service, both on the original and appellate sides."

The CJI added: "Throughout his tenure as a judge for 20 years in different High Courts and the Supreme Court, Justice Reddy always upheld and protected the people's liberties. Justice Reddy is known for his compassion and consciousness about social realities. I have also shared a bench with him and have benefited from his opinions and acumen. Justice Reddy shall also be remembered for his dedicated commitment on the administrative side of the Supreme Court."

"He will always be remembered as a fair and hardworking judge. I have always cherished his strong support and friendship in our 40 years of association," the CJI said.

Justice Subhash Reddy at SCBA farewell: 19th century procedures need to be modernised

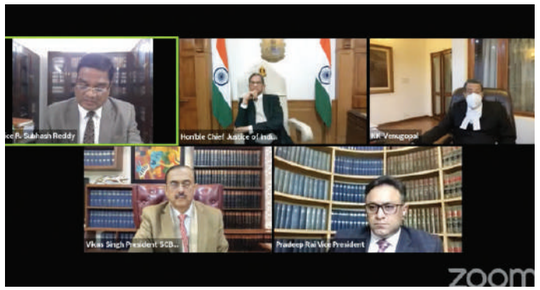
At a farewell function organised virtually by the Supreme Court Bar Association, retiring top court judge, R Subhash Reddy (right, first from left, top row) observed that there has been a gradual decline in the efficiency and the quality of justice. He said: "The public confidence in the court depends upon the efficiency of the judiciary. There has been a rapid change in the values of life and morals and the need replaced by greed. The deterioration in the human values has an impact for once alarming rise in cases and crimes."

Speaking on the pendency of the cases, Justice Reddy said: "All the courts in our country have a huge backlog of pending cases. Every year, this backlog swells in size because of the increase in several kinds of court procedures. The existing procedural laws are not designed to meet the challenges which courts are facing today.

"The time consuming traditional procedures, civil and criminal, prescribed in the 19th century for the trial of cases in a pre-industrial society require to be modernised to suit the needs of a modern society," he added.

He said he was demitting office with great satisfaction and called the SCBA a big think-tank.

On this occasion, Attorney General KK Venugopal (above, third from left, top row) said: "It is a travesty that the judges of the Supreme Court retire at the age of 65 and the judges of the High Courts retire at the age of 62. Looking at any of the judges at the Supreme Court, I can state with conviction that each one of them would be able to perform his duty as the judge of the apex court justly, fairly and with competence." He said: "When 70-year-old lawyers can function with no difficulty whatsoever, why should not the judges of the Supreme Court retire at the age of 70 and High Court judges at 65?"



SCBA president Vikas Singh (above, first from left, second row) said that Justice Reddy's popularity and standing at the Bar is reflected by the fact that he was the only advocate in the last 25 years to have been unanimously elected as the president of the Andhra Pradesh HC advocates' association for 2001-02.

SCBA Vice President and Senior Advocate Pradeep Rai (above, right, second row) spoke of Justice Reddy's deep interest in philosophy, culture, music and education. He said: "Before becoming the judge of Andhra Pradesh, Justice Reddy had practised law for 22 years in the tribunals, civil courts and High Court of Andhra Pradesh. He actively participated in almost all the branches of law. He specialised in constitutional law."

Asthana appointment as Delhi CP: Supreme Court to hear after two weeks

The Supreme Court heard the challenge against the appointment of Rakesh Asthana (below) as Delhi Police Commissioner and will take up the matter again after two weeks. Senior Advocate Prashant Bhushan appeared for the petitioner, Centre for Public Interest Litigation (CPIL). Asthana, in his affidavit, justified his appointment, saying the petition against him was filed due to personal vendetta and malicious agenda. He said that the petition was not in public interest but was an abuse of process and this platform.

The centre had earlier justified the appointment of the 1984 batch IPS officer as Delhi Police Commissioner and said that there was a need to appoint an officer like Asthana as the chief of Delhi Police, keeping in mind the extremely challenging conditions of public order in the capital and national security. Asthana was given inter-cadre deputation and extension of service in public interest, the centre had justified.

The Home Ministry said the 2016 order of the Supreme Court in the *Prakash Singh* case was also complied with, with sufficient justification for selecting Asthana.

Supreme Court upholds Calcutta HC order staying criminal proceedings against Suvendu Adhikari

The Supreme Court upheld the order of the Calcutta High Court, which had stayed criminal proceedings initiated against West Bengal's leader of the opposition and BJP MLA Suvendu Adhikari (left). The apex court ordered that no coercive action be taken against him and that he cannot be arrested in either existing or future cases without the High Court's nod.

Justice DY Chandrachud observed that the Court could not entertain this for the simple reason that the order of the single judge was challenged under Article 136 before the Supreme Court.

Earlier in September, the single-judge bench of the Calcutta High Court had stayed any coercive action in the criminal cases registered against Adhikari by the West Bengal government.

Supreme Court clears counselling for NEET with existing quotas for OBCs and EWS

The apex court in an interim order allowed NEET counselling for UG and PG admissions to resume in "national interest" and upheld the 27% quota for OBCs and 10% quota for the Economically Weaker Sections (EWS) for 2021-22. A two-judge bench led by Justice DY Chandrachud also accepted, for the current academic cycle, the conclusions of the panel which had retained the Rs 8 lakh annual income cut-off limit decided by the centre for identifying those under the EWS quota. The panel was set up by the centre.

The counselling for NEET UG and PG programmes was suspended as the centre had told the Court that it would not proceed with it during the pendency of a clutch of petitions challenging the centre's notification in the top court. Recently junior doctors had gone on strike protesting against the delay in counselling.

The bench, however, clarified that the final order regarding the validity of the criteria determined by the panel was yet to be decided and it will again take up the issue in March.

Earlier, the bench wanted to know the basis on which the centre had determined the income criteria for the EWS. Thereafter, the centre had formed a three-member panel to analyse the feasibility of the Rs 8 lakh limit. After the panel stood by the limit set by the centre for NEET-PG for the current admission cycle, the centre came back to the Supreme Court with the findings of the panel. But the bench wondered whether the committee had done due diligence on the finer aspects of the issue before justifying the income limit and had reserved its verdict.

RID ME OF DRINKERS

The Bihar prohibition law was cited by the CJI as an example of "lack of foresight" in drafting legislation. Legislating is serious business. It should be handled with care after proper scrutiny of its constitutionality and assessment of impact on the judicial system

By Justice Kamaljit Singh Garewal

UNI

POLITICAL WHIMS
The Emergency in 1975 (above right), Bihar prohibition (left) in 2016 and the farm laws in 2020 (above left) are some of the examples of legislations that are constitutionally invalid

BIHAR came under total prohibition in April 2016. This was part of an abstemious chief minister's social reform programme. He may as well have said: "Will no one rid me of these drinkers." The government went into overdrive to get the state legislature enact a draconian law called the Bihar Prohibition and Excise Act, 2016. Under this law, sentences are disproportionately harsh, police has power to arrest even people drinking privately at home, confiscate their properties and also detain all adults of the family present, including non-drinkers. The figures of cases registered are astoundingly high. About 3,48,170 cases had been registered and 4,01,855 persons arrested till October 2021. Twenty-five thousand accused are in custody awaiting a bail hearing, which usually takes a year. The conviction rate is abysmally low at 1%. Need more be said about this atrocious law?

"Will no one rid me of this turbulent priest"? Henry II uttered on Christmas Day, 1170. It was not an order but a lament. Thomas Becket, the Archbishop of Canterbury, had been on a bishop excommunication spree, which had prompted this outburst by his king. Henry II's four loyal and faithful knights hastened to Canterbury and assassinated the Archbishop. The phrase led to the development of constitutional law by forcing the king to agree that secular courts had no jurisdiction over clergy, thus separating ecclesiastic courts from temporal. The phrase is an example of a direction via indirection, in that it provides the speaker with plausible deniability when a crime is committed as a result of his words.

UNI

There are many versions of the incident. Two famous works based on this historic event are TS Eliot's "Murder in the Cathedral" (1932) and Jean Anhouil's play "Becket" (1959), which was later made into a film with two great actors, Richard Burton as Thomas Becket and Peter O'Toole as Henry II. The phrase is now used to defend the speaker to isolate him from the wrongs which may follow in its wake.

One can count many such Henry II moments in our own constitutional history, a prime minister's exasperation leading to the passage of constitutionally invalid laws. Some examples are the Ninth Schedule in 1951, Emergency in 1975, Bihar Prohibition in 2016 and Farm Laws in 2020—the list may be endless. One must say to the credit of the present prime minister that, faced by a long drawn out protest by farmers, he showed courage to admit his folly and repeal the three farm laws.

The boss just has to say "will no one rid me of *zamindars* or agitators or drinkers or farmers". His large body of competent secretaries and staff rush to draft a law as desired by the boss. Sometimes dreading constitutional predicament, the laws are immunised from legal challenge by another clever piece of legislation. The badly drafted law eventually gets overruled or repealed. But the people who bear the brunt are the citizens who have suffered the law's rigours but never receive compensation for the damage inflicted on them.

The law and justice minister and his drafters remain untouched. In any case, by the time the courts declare the offending clauses void, the minister has probably lost his seat and with it, his job. A new government is in power. And the drafter has been driven into the sunset in a fancy car to a fancy home with children studying in universities abroad. Who is to blame for this? But something should be done to curb this tendency. Law-makers should realise that they create a huge problem by making laws which are unconstitutional. Instead, they always try to brazen their way through the judiciary.

Why not draft laws carefully even if they are meant to fulfill the political whims of some chief minister or diktats of his party or a significant socio-economic reform. Why not employ jurists/lawyers/retired judges to hold public hearings to have a good second look at the bill before it is placed before the legislature? There are a vast number of things which can go wrong with the drafting, and knowledgable people can and do notice such faux pas. They may recommend improvement in the draft or eraser of a clause if it offends the Constitution.

Of the three recent repealed farm laws, at least one was beyond the legislative competence of Parliament because "agriculture" is a state subject. Why was what it cost the nation and its citizens. ▶

One retired chief justice in the Rajya Sabha is not enough. We need at least 25 retired judges to sit in the Upper House as advisors to the government of the day. In the French Conseil d'Etat, legislative bills are first of all examined by its judges before they become law. Only very occasionally do they come up for judicial review because they are usually near perfect.

Let us begin from the beginning. In 1950, Prime Minister Jawaharlal Nehru had some outlandish ideas about his and his party's supremacy over the Constitution, judges and lawyers. The Constitution had been praised as very well drafted, but it soon became the first hurdle in Nehru's land reforms and job reservations policies.

The Patna High Court had held the newly enacted Bihar Land Reforms Act, 1950 unconstitutional. The matter came up in appeal before the Supreme Court. Certain *zamindars* had also approached the Supreme Court under Article 32 of the Constitution. This was when Nehru panicked. It was his Henry II moment.

Nehru wrote to chief ministers in early 1951: "It is impossible to hand up urgent social changes because the Constitution comes in the way.... We shall have to find a remedy, even though this might involve a change in the Constitution." Nehru's exasperation was evident when he thundered, as he moved the Constitution (First Amendment) Bill to be referred to a standing committee in Parliament on May 16, 1951: "Somehow,

In the French Conseil d'Etat, legislative bills are first of all examined by its judges before they become law. Only very occasionally do they come up for judicial review as they are near perfect.

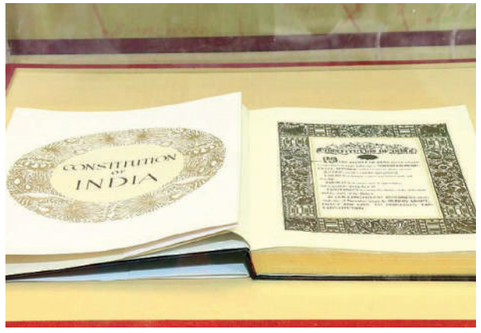
we have found that this magnificent Constitution that we had framed was later kidnapped and purloined by lawyers." Much later, Chief Justice M Hidayatullah had remarked: "Ours is the only Constitution that needs protection against itself."

Will someone rid me of *zamindars*? And sure enough, Articles 31-A and 31-B were added to the Constitution through the Constitution (First Amendment) Act, 1951 to protect agrarian reforms. Legislative measures received further immunity from possible challenges in courts, through the newly added Ninth Schedule. There were 13 acts which related to land reform laws, immunising these laws from challenge on the ground of violation of fundamental rights.

The Bihar High Court had found the formula for payment of compensation unfair. Small *zamindars* who had annual incomes above Rs 500 were to receive compensation at 20 times the income and the big ones, whose annual incomes were above Rs 1 lakh, only three times their income as compensation. Such an obvious discrimination was asking to be declared discriminatory. In 1950, many other state laws were being declared unconstitutional by different High Courts on the basis of violation of fundamental rights. This caused nervousness in Prime Minister Nehru. He was still a provisional prime minister in a provisional parliament without an Upper House and without a mandate based on universal suffrage. Nehru was yet to face the people and was getting ready for the first general election with promises of land reforms, and job reservations.

After the Constitution came into force on January 26, 1950, state legislatures started to frame land reform laws to abolish *zamindaris* and secure land tenures of tenant/cultivators. No doubt, these were laudable objectives but laws as drafted were unconstitutional on the face of it. One must run through the list of enactments in the Ninth Schedule. After the original 13, another 271 were added.

The first addition of seven came in 1955. Entries 21 to 64 were added on June 20, 1964, a few days after Nehru's death. Then two were added in 1972.



A STUMBLING BLOCK
The Constitution despite being very well drafted became the first hurdle in Nehru's land reforms and job reservations policies

Until then, all laws added to this Schedule related to land reforms or land acquisition or tenancy. This was the pre-*Kesavananda Bharati* era.

After this landmark judgment, 20 were added on September 7, 1974. These too related to new land reforms legislation. But on August 10, 1975 (note the date), six laws were added which had nothing to do with land reforms. This was Prime Minister Indira Gandhi's time and Emergency was in force. Her advisers had counselled her to immunise laws like Industries (Development & Regulation) Act, 1951; Requisition & Acquisition of Immovable Property Act, 1952; Mines and Minerals (Development & Regulation) Act 1957 and Monopolies and Restrictive Trade Practices Act, 1969 and even election and internal security legislations. All these periodic immunisation drives to keep legislation away from judicial review went unhindered. Even after the Basic Structure Doctrine became a part of our constitutional law on April 24, 1973, the government did not refrain from adding laws to the Ninth Schedule which had nothing whatsoever to do with land reforms.

In *Waman Rao* (1981), the Supreme Court held that amendments to the Constitution made on or after April 24, 1973, by which the Ninth Schedule was amended, were open to challenge on the ground that they were beyond the constituent power of Parliament as they damage the basic features of the Constitution. Apparently, in *Minerva Mills* (1980) and *Maharao Bhim Singh* (1981), it was felt that there were some inconsistencies in *Waman Rao*. The matter was finally settled by a nine-judge bench of the Supreme Court in *I.R. Coehlo* (2007) and it was held that laws in the Ninth Schedule were not immune from judicial review as the Schedule was a part of the Constitution.

Nehru's device to immunise laws from being challenged has now finally been laid to rest in *I.R. Coehlo*. What an effective vaccine it proved to be and what a long period of immunisation of over half a century. Plaudits to the civil servants for delivering this vaccine and eternal ignominy to the nation for accepting such abomination. Let's hope the Bihar Prohibition and Excise Act, 2016 is the last of India's unworkable and unconstitutional laws and we have no more Henry II moments.

The Chief Justice of India, NV Ramana, recently spoke about the challenges faced by the Indian judiciary. The points raised by him are extremely valid when a bill is prepared for a specific purpose.

Recently, Chief Justice of India NV Ramana spoke about the challenges faced by the Indian judiciary on the occasion of the Fifth Late Shri Lavu Venkateswarlu Endowment Lecture at Siddhartha Law College in Vijayawada. He cited the prohibition law in Bihar as an example of "lack of foresight" in drafting legislation that leads to courts being inundated with cases, and said it appears that the legislature has "not been able to make optimum use" of the Parliament Standing Committee system to "enhance scrutiny of Bills".

Chief Justice Ramana pointed at the lack of basic scrutiny of constitutionality and absence of impact assessment. Both these points are extremely valid when a bill is prepared for a specific purpose to criminalise certain acts or bring about a desired reform.

Legislating is serious business. It should not be left to middle government officials but should be handled by senior bureaucrats who have a deep understanding of constitutional law and the working of the judiciary.

For scrutiny of constitutionality and impact assessment, help must be taken of law schools, legal service authorities, think tanks and NGOs having expertise in the concerned fields. Finally, when the matter is before the legislature, meaningful debate must be allowed to be conducted instead of relying on majorities to get the bills passed. We should discard the "Ninth Schedule" syndrome which caused such devastation to constitutional principles. Even legislation unrelated to Article 31 was put in this Schedule to immunise it from challenge.

The Bihar law is an extension of the same thought processes. Frame an unworkable, impractical and tough law unmindful of its impact on trials courts and jails. And let over-burdened courts face the further burden of cases. ■

The writer is former judge, Punjab & Haryana High Court, Chandigarh and former judge, United Nations Appeals Tribunal, New York

2022 AND PATRIARCHY LIVES ON...

Raising the marriage age of women from 18 to 21 years has its drawbacks. In reality what is needed is their economic and health empowerment and achieving sustainable development goals

By Shaan Katari Libby

A CONFIDENT STEP: India is generally in a great hurry to marry off her girls, so maybe this increase to 21 years will help women gain working potential so that even if the marriage fails, she can continue to stand on her own feet

The Bill mentions that child marriage is still not completely eradicated from society. Union minister Smriti Irani mentioned an urgent need to tackle this societal issue and bring in reforms.

THE government seeks to raise the legal age of marriage for women from 18 to 21 years. The Prohibition of Child Marriage (Amendment) Bill was introduced in the Lok Sabha during the winter session. It was referred to the Parliamentary Standing Committee on Education, Women, Children, Youth and Sports. But how does the statement of object and reasons play out and what do women lawyers from various religions feel about it?

To begin with, the Bill mentions that the "highly pernicious practice" of child marriage is still not completely eradicated from society. Smriti Irani, the minister of women and child development, mentioned an urgent need to tackle this societal issue and to bring in reforms. But as Advocate Dr K Santhakumari said: "If the government cannot enforce a law with 18 as the minimum age, how will it enforce it with 21?"

Advocate Elizabeth Seshadri said that instead of more regulation, what is needed are "more honest conversations about women's economic empowerment, their education and contribution to society and challenging some of the patriarchal notions of family, happiness and purpose in life. We also need safe spaces for youngsters to report family pressure, counselling for families, police intervention when coercion is reported and public awareness programmes to report such pressure."

The Bill speaks of how we cannot claim progress unless women progress on all fronts, including their physical, mental and reproductive health. The enactments relating to age of marriage such as the Indian Christian Marriage Act, 1872; the Parsi Marriage and Divorce Act, 1936; the Muslim Personal Law (Shariat) Application Act, 1937; the Special Marriage Act, 1954; the Hindu Marriage Act, 1955 and the Foreign Marriage Act, 1969, do not provide for a uniform minimum age of marriage for men and women.

As Chennai-based Senior Advocate Bader Sayeed said, in western countries, there is one law for every person. This, even though Muslim personal laws say that the marriageable age is puberty. "Looking at the shape of things today, we need a Uniform Civil Code and many women in Tamil Nadu need the age to be raised. Muslims follow the law of the land in the UK and the US—you cannot divorce without going to court. Just like that, India needs a uniform law."

Law student Jumanah Kader felt the choice should be left to women. "As a young Muslim woman, I applaud the initiative taken for enforcing a gender-neutral law concerning the minimum age of marriage. However, I believe that extensive investment in education and empowerment is the need of the hour. In my community, there's a provision which allows early marriages (on attaining puberty), but that is neither a mandate nor a compulsion. Such a provision was made to prevent loss of life during wars and the same should not be abused at any cost."

The Bill was meant to meet the constitutional guarantees of gender equality as part of the fundamental rights and prohibition of discrimination on the grounds of sex. A lack of gender equality in marriageable age among men and women often puts the latter in a disadvantageous position with regard to higher education, vocational instruction, attainment of psychological maturity and skill-sets. These disadvantages perpetuate dependence of women on men.

The Bill goes on to say: "It is imperative to tackle gender inequality and gender discrimination and to put in place adequate measures to secure health, welfare and empowerment of our women and girls and to ensure status and opportunity for them at par with men."

All these are noble goals and cannot be questioned. What can be questioned, however, is how a girl who is already perceived by traditional Indians to be a ▶

"The introduction of this Bill is to win the votes of the majoritarian community in a state where elections are fast approaching. We have been witnessing anti-conversion Acts/Bills in the name of marriage just to deprive the right of choice of women who want to marry outside their religion."

—Dr K Santhakumari, advocate

"If you book everyone responsible for pregnancy of teens below 18 within a marriage, the prisons have to be increased 10-fold. It's only putting up a show when we are not anywhere closer to achieving sustainable development goals and eradicating the issues which push children into marriage."

—Ajeetha Bhakthavachalam, advocate

burden at birth will now be welcomed or even tolerated when she will be around for another three years, potentially.

Advocate Ajeetha Bhakthavachalam said it is farcical to raise the age of marriage of women to 21 and put it forth as "progressive". Even according to data of the National Family Health Survey, women aged 20-24 years married before 18 varied between 14.7% and 27%. "Hence when socioeconomic development is not ensured, when housing rights are in question, when we don't even assure free education after 14 years, parents see the protection for the girl children is at stake and resort to child marriages," said Bhakthavachalam.

"When the central government fails to address this, raising the marriage age to 21 will only criminalise a huge population. If you book everyone responsible for pregnancy of teens below 18 within a marriage, the prisons have to be increased 10-fold. It's only putting up a show when we are not anywhere closer to achieving sustainable development goals and eradicating the issues which push children into marriage," she said.

One wonders why, for instance, we are not focussing on practical visible changes like ensuring that every institution is 50% women? Surely that would be a positive change, tackle patriarchy head on and is achievable? Why does the committee examining this Bill and making decisions about women's lives have 30 men and one solitary woman on it? The Members' list of the parliamentary standing committee, led by senior BJP leader Vinay Sahasrabuddhe, is on the Rajya Sabha website, and TMC MP Sushmita Dev is the only woman. If this does not scream patriarchy, what does?

Also, as pointed out in my previous article on this subject, why is India in the company of dictatorships from China to North Korea to a host of African countries when the rest of the world sees fit to allow both men and women a choice at 18 years?

To this point, Sayeed is of the opinion that women in India are manipulated and brainwashed. Young girls at 17 and 18 are not ready for the emotional turmoil and adjustment that marriage brings. In India, it is not just about two people—it is about their families too. "We need a deterrent." she said. Some parents may say: "It's a wonderful marriage offer, why should we wait till 21?"

As for why they should be able to vote at 18 years when technically they are still children under the Act, she felt that "voting is a different matter—some do, some don't. Marriage is different. It doesn't mean everyone will marry at 18, but parents will start to put pressure on them to get married—that's the difference between third world countries like ours and the West. Where is the question of going to college if they are married at 18?"

The Committee examining the Prohibition of Child Marriage (Amendment) Bill has 30 men but one solitary woman, TMC MP Sushmita Dev, on board. If this does not scream patriarchy, what does?

Seshadri said: "What is the idea of a legal minimum age? When punishment for crime or for guardianship is determined at 18, I don't see the sense in taking away a person's agency in the matter of marriage till 21." Advocate Avanti Balachander added: "If I, as a girl become a major at 18 and can legally do many things which were previously illegal, then why is marriage to be any different? In fact, marriageable age for all genders should be 18."

Seshadri said: "But in the peculiar social conditions India lives in, where marriage is often not a personal choice but a matter of family pressure, coercion or manipulation, this gives the backing of law for a girl who needs to tell her family to back off. It may even encourage higher education for girls in some sections of society."

The Act seeks to bring women on a par with men in terms of marriageable age; this is clear, even though it jars to see a "child" being defined as anyone below 21 years. As for prohibition of child marriage irrespective of any law, custom, usage or practice governing the parties, this was already the case before this proposed amendment. The Principal Act (Child Marriage Act 2006) states at Section 3(1): "Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage."

The provisions of the Act have an overriding effect over every other law, custom, usage or practice. The objectives seek to make the amendments effective in relation to marriageable age, two years from the date the Bill receives assent of the president, but what is ominous is the seemingly incongruous statement "4. In section 3 of the principal Act, in sub-section (3), for the words "two years", the words "five years" shall be substituted."

The effect of this is the potential "rolling back" of numerous marriages—many of which will have been interfaith. Santhakumari said: "The introduction of this Bill is to win the votes of the majoritarian community in a state where elections are fast approaching. We have been witnessing anti-conversion Acts/Bills in the name of marriage just to deprive the right of choice of women who want to marry outside their religion."

NOBLE OBJECTIVE
The Bill speaks of how we cannot claim progress unless women progress on all fronts, including their physical, mental and reproductive health

Extending this line of thought, we can foresee parents flocking to courts seeking to roll back marriages of five years ago. "Criminal cases will be on the rise if a woman chooses to live with the one she wants. The parents of the woman might file false cases against the man," said Advocate Gemma Hepsibeulah.

Avanti pointed out: "On the one hand, girls are getting married into households where they're groomed to be tolerant housewives and nothing else. But on the other hand, young women are employing marriage as a tool to escape their own abusive households and pursue a freer life under the garb of 'wife' as opposed to 'daughter'."

"As a young Muslim woman, I applaud the initiative taken for enforcing a gender-neutral law concerning the minimum age of marriage. However, I believe that extensive investment in education and empowerment is the need of the hour."

—Jumanah Kader, law student

The latter category is in trouble also as there are those who marry simply because they are in love with someone of another religion. The idea that a young woman might actually have her own mind and capability of reasoning needs to be given consideration.

The pros of this Bill boil down to what Sayeed said: "Because of patriarchy, girls are seen as a burden. Girls are scared to reject proposals as they may be the target of acid-throwing. Here, the age of consent can help because it would be illegal to marry below 21. I believe strongly that raising the age to 21 is correct. Kids have an aspiration to go to college and they get brainwashed into believing that marriage is even better."

On the other hand, as Seshadri said: "... let's not be naive and think that a legally prescribed marriage age has any effect on hormones of the youth. My concern is that women should not be denied appropriate healthcare or face safety issues before 21 because of the moral-policing." Hepsibeulah has a similar view: "Premarital sex will be on the rise, which might lead to unwanted pregnancies, abortions and birth of children. When children are born to unwed mothers, it is extremely difficult to make the father maintain the child."

At the end of the day, as Santhakumari said: "The Bill suggests changes in the personal laws of various communities, as though personal laws are hindrances in implementing the minimum age for marriage. Numerous court decisions have held categorically that child marriage laws supersede all personal laws."

Nobody can argue that equality of marriageable age is desirable, but making it 21 for both sexes rather than 18 is the sticking point. India is generally in a great hurry to marry off her girls, so maybe this increase to 21 years will help women gain working potential so that even if the marriage fails, she can continue to stand on her own feet. That said, the retrospective effect of five years calls into question the true intentions of this gender equality-based Bill. ■

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Stick to the Brief

A judge created a stir recently by making unnecessary remarks in a bail order. These go against the principles of judicial discipline and secular ethos. A judge is supposed to go by facts and laws

By Lokendra Malik and Yogesh Pratap Singh

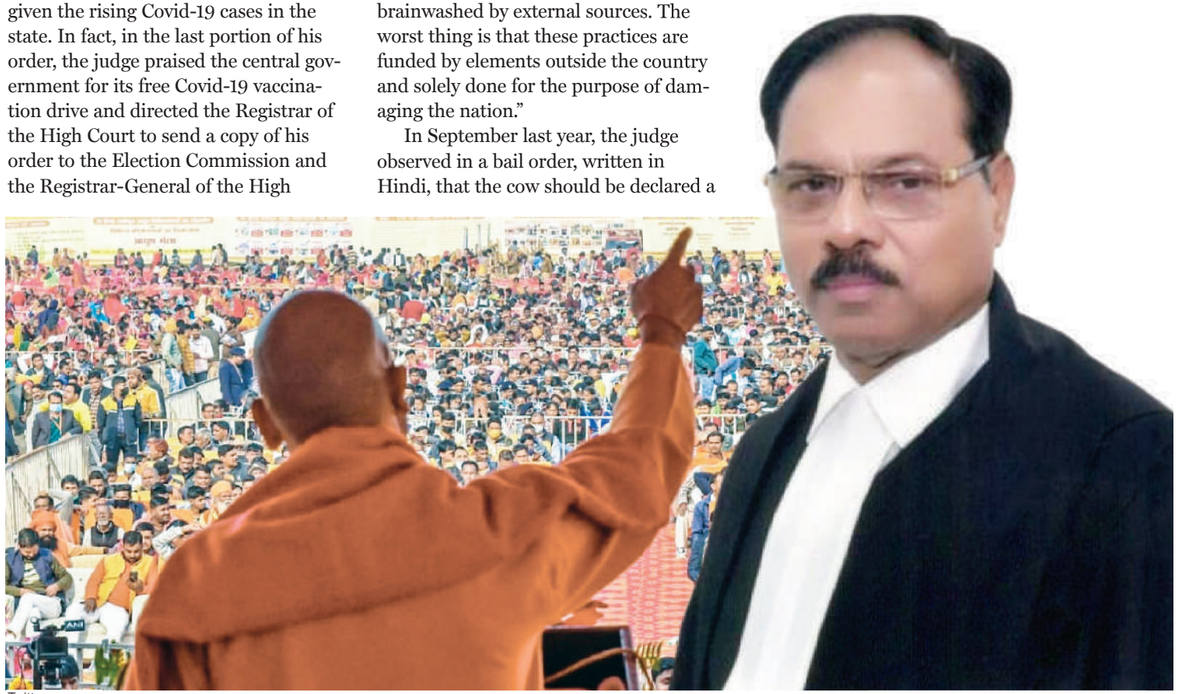
IT is vital for any country governed by the rule of law that its judges decide cases solely on the evidence presented by parties and law. Judicial accountability vanishes when a judge travels beyond the case and makes unnecessary remarks in his decisions. This would set a precarious precedent and is undesirable.

Justice Shekhar Kumar Yadav, a judge of the Allahabad High Court, once again made headlines in a bail order. He suggested to the Election Commission that it ban poll rallies and postpone the UP assembly elections for a few months given the rising Covid-19 cases in the state. In fact, in the last portion of his order, the judge praised the central government for its free Covid-19 vaccination drive and directed the Registrar of the High Court to send a copy of his order to the Election Commission and the Registrar-General of the High Court of Allahabad.

When the judge heard the case, his courtroom was packed with lawyers and this seems to have prompted him to make these remarks. His concerns may be genuine, but such remarks should not be included in the orders of the court.

This is not the first time that Justice Yadav has gone beyond the pleadings in his bail orders/judgments. In July last year, he made some remarks about inter-faith marriages and conversion that also made headlines. "We come across news of the poor, disabled, and women getting converted after they are brainwashed by external sources. The worst thing is that these practices are funded by elements outside the country and solely done for the purpose of damaging the nation."

In September last year, the judge observed in a bail order, written in Hindi, that the cow should be declared a national animal and cow protection must be made a fundamental right of the Hindus. He also stated that "scientists believe that the cow is the only animal that exhales oxygen". These observations were also made while rejecting the bail of an accused, charged for theft and trafficking of cows under the UP Cow Slaughter Act. In the order, the judge wrote a detailed piece about the cow and its religious importance. The order was widely reported in the national and international media and several intellectuals, retired judges and constitutional pundits disagreed with the observations.



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NO STRANGER TO CONTROVERSY
Justice Shekhar Kumar Yadav (below) in his bail order suggested to the EC to ban poll rallies in UP due to rising Covid cases

UNI

Justice Yadav had earlier made unnecessary observations in his bail orders, such as highlighting the importance of cow in India and noting that Lord Rama resides in the heart of every citizen and India is incomplete without him.

In October last year, Justice Yadav asked the centre to consider bringing a law to give national honour and heritage status to Lord Rama, Lord Krishna, Bhagwad Gita, Maharishi Valmiki and Maharishi Ved Vyas. In his order, he also mentioned that Lord Rama resides in the heart of every citizen and India is incomplete without him. These observations were also made in a bail matter in which the accused was charged for making obscene pictures of Hindu deities. Several legal scholars rightly believe that these kinds of remarks should have been avoided by the judge. There were more cases where he went beyond his brief.

These unnecessary remarks go against the well-established principles of criminal jurisprudence, judicial discipline and secular ethos. While deciding a bail application, a judge is not required to make these kinds of remarks that have nothing to do with the facts of the case. A judge is expected to decide the matter in the light of the factual background, case laws and legal principles.

Secularism is a basic feature of the Constitution and a judge is duty-bound to uphold it as per the mandate of his oath of office. No judge has absolute freedom to say anything in his verdicts and that too in a judicial order which is also followed by the district judiciary as a precedent. As a judge of the High Court, he has no need to tell the executive/legislature to enact laws of his choice. This would be violation of the well-settled principles of separation of powers that form part of the basic structure of the Constitution and overrides judicial restraint.

Also, by openly expressing his religious thoughts and beliefs in his judgments and orders, no judge can do justice to his constitutional position and judicial authority. This not only affects the credibility and integrity of a particular judge, but damages the collective dignity, integrity and independence of the entire judicial system. It also diminishes people's trust in the institution of the judiciary. Such a judge cannot be considered fair-minded, especially when matters relating to religious freedom and minorities' rights are brought before him. In a country governed by the rule of law, no person has the right to impose his religious views on others.

The Supreme Court collegium recently refused to confirm the appointment of an additional judge of the Bombay High Court as she had delivered a wrong judgment in a POCSO case. The remarks made by Justice Yadav cannot also be brushed aside lightly. Should not permanent judges bear responsibility for delivering wrong judgments? But unfortunately, we do not have any mechanism to deal with this kind of situation. Can the collegium take notice of his remarks? Can the chief justice of the High Court take *suo motu* cognizance of the matter?

It is high time that the Supreme Court takes *suo motu* notice of his remarks and expunge them as early as possible. It will set a precedent and judges will not lower the prestige, dignity, integrity and authority of the judiciary by making comments that weaken people's faith in it. Judges write judgments to deliver justice to the people, not for expressing their own views, philosophy and vision. Thus, judges need to write their judgments carefully by following judicial discipline and constitutional principles.

Eminent jurist HM Seervai said: "If a judge allows his judgment to be influenced by colour, race, religion, and caste, he is not only false to his oath but lacks the judicial approach which is an attitude of the mind, accompanied by a sense of duty and self-discipline." ■

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Practise Makes Perfect

CJI NV Ramana recently spoke about the need for practical courses for law students. One of the foremost concerns is their lack of experience with routine legal tasks and court procedures

By Abhinav Mehrotra

THE debate between practical and theoretical aspects of legal education has been growing. In this context, the norms surrounding legal pedagogy and course curriculum, along with ensuring the ethical and moral development of the students, need to be re-emphasised.

A recent statement by Chief Justice of India NV Ramana on the need to introduce practical courses for law students has pushed the discussion further. He emphasised that very few students who graduate from the National Law Schools are joining litigation or advocating public causes and practicing at the district level.

So what exactly are the tasks performed by a lawyer? In simple terms, according to a 1992 report of the American Bar Association, called the *MacCrate Report*, the work of a lawyer revolves around analysis of the facts of a client's case, research of the laws involved, counselling the clients on the options available and negotiating disputes before or outside the court.

Some of the foremost concerns are lack of experience with routine legal tasks and court procedures, little or no understanding of how to cope with real life fact situations and the need for more exposure to non-legal problems, such as developing healthy working relationships and office management.

What needs to be understood is the physical setting of a university focusing on legal studies in order to ascertain the feasibility of practical training for students. Unlike other practical courses like medicine whose course curriculum requires it to be in close connection with practical aspects, the situation is different when it comes to law schools. Their lecture rooms are not designed in accordance with courtrooms and law offices. However, they have moot court rooms and the provision of internships every six months. These add practical dimension to the course as students learn the skills of drafting, researching and visiting courts at the district and higher levels. In general, universities are considered epitomes of knowledge. Further, evaluating requires the assessor to assess the application of knowledge in a hypothetically created situation.

Despite certain limitations, law schools have introduced courses related to the process of litigation such as pleading and practice, trial practice, and moot courts that give a glimpse of the practical aspects involved in the profession. In addition, there has been widespread expansion of clinical programmes in law schools that aim to offer practice-oriented courses dealing with actual legal problems and institutions. The rationale behind these courses is based on "learning by doing". It is composed of three elements—professional skills training, learning through experience and imparting professional values of providing access to justice.

adypu.edu.in

LEARNING BY DOING
(Facing page) CJI Ramana's statement on practical courses has pushed the discussion further; (top and above) the classrooms in law colleges are not designed as per courtrooms, barring mock court rooms

In this context, the collaboration between teachers assumes significance as it helps them to reflect on their objectives, methods and assessment criteria, i.e. the use of strategies and learning models to improve comprehension and efforts to raise awareness among students that requires modification in the content, approach, structures and strategies. This becomes clearer through the definition given by UNESCO of inclusion, which is defined as "a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures, and communities, and reducing exclusion within and from education".

It was in 2002 that the Law Commission of India recommended setting up of four colleges in each region with the aim to imparting professional training to law teachers. In a similar vein, the Bar Council of India amended its rules in 2008 for professional development and other legal education-related needs and suggested the creation of a "Directorate of Legal Education".

The larger question about law teachers is how to develop the aspect of cooperation between themselves as a group so that the students can benefit from their combined experience and at the same time, reflect upon the issues that might surface in achieving such cooperation. For example, teachers cooperating with each other identify lack of time for planning and implementation, resistance from colleagues and increased workloads and responsibilities as major obstacles to successful implementation of cooperative teaching. Further, working together requires the teachers to learn to work and teach together. That takes time and requires the teachers to overcome differences in their philosophy, pedagogical style and background, as well as concerns about working with and being observed by another professional.

The core of the issue is the multifaceted growth of law that has resulted in the introduction of new fields, such as environmental law and consumer protection. As a result, much more substantive law has to be taught and less time is available to devote to practical and skill-oriented aspects. This aspect is accompanied by varied interests and goals of the students that make it difficult to create programmes of practical instruction. In addition, there is the high financial cost of practical training and the loss of time which would otherwise be devoted to more theoretical study.

From an international perspective, the Carnegie Foundation had issued a report in 2007 titled "Educating Lawyers: Preparation for the Profession of Law". The report emphasised that legal theory has been overemphasised, while practical skills and development underemphasised. To illustrate, the report refers to the case study method where it states that students are deprived of their sense of fairness and justice and are made to view the actors involved from legal rules and principles and not from the real world context.

At the same time, it emphasises inculcating a high sense of moral and ethical identity that would contribute to the growth of the profession itself. The thrust of the report is to contextualise and humanise legal education and integrate clinical education into legal theory.

It is therefore clear that there is a need to bridge the gap between theory and practice. However, the practical aspect of implementing such changes needs to be considered. Some suggestions have also been made in the Carnegie report that include focusing on writing and research classes in the overall curriculum; increasing the importance of classes on negotiation and developing alternative dispute resolution. ■

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Home & Hearth

In 2017, the PM changed All-India Service Rules to allow married officers to get the same cadre state. Despite this, the apex court had to issue a notice to West Bengal to issue an NOC for the transfer of an IAS officer

THE Supreme Court on January 4, 2022, issued notice after a plea was filed by the West Bengal government against a Delhi High Court order. The order directed the state government to issue a no-objection certificate (NOC) for the transfer of IAS officer Lakshmi Bhavya Tanneeru.

Tanneeru had sought an inter-cadre transfer to Tamil Nadu after she got married to Tamil Nadu cadre IAS officer Raja Gopal Sunkara in 2016. The West Bengal government in November 2016 refused to grant its consent for the inter-cadre transfer citing shortage of officers.

The apex court bench of Justice KM Joseph and Justice PS Narasimha assured an early listing of the matter and settling the position of law. Justice Joseph remarked: "If the IAS officers end up marrying officers from other cadres and seek for a transfer, how will the states function?"

Tanneeru gave a representation on March 29, 2016, to the Secretary, Department of Personnel and Training (DoPT) for inter-cadre transfer. The DoPT forwarded it to the chief secretary, West Bengal, in order to secure the concurrence of the state before effecting the inter-cadre transfer.

On July 21, 2016, the Tamil Nadu chief secretary forwarded the NOC regarding her transfer to the state cadre. However, West Bengal declined the request citing an acute shortage of officers. Interestingly though, West Bengal offered to absorb her spouse, Raja Gopal Sunkara, in the state cadre, provided he chose to make such a move.

Evidently, she accepted her lot for the next three years or so, after which she made a fresh representation to West Bengal for reconsideration of her proposal for change in cadre. As there was no movement in the matter, the petitioner approached the Central Administrative Tribunal (CAT). Despite the Tribunal's direction to West Bengal to reconsider her request, the state let the matter rest. This impelled her to make a representation on April 13, 2021 to the chief secretary of West Bengal. There was still no response, leading Tanneru to approach the Delhi High Court.

The bench of Justices KM Joseph (left) and PS Narasimha assured an early listing of the matter and settling the position of law. Justice Joseph said: "If IAS officers end up marrying officers from other cadres and seek a transfer, how will the states function?"

The Court observed from Rule 5(2) of the 1954 Cadre Rules that inter-cadre transfer cannot take place without the concurrence of the concerned state government to whom the officer is attached/assigned. However, the refusal of the request for inter-cadre transfer by an officer on the ground of marriage can only be sustained if it is backed by cogent reasons—as such a decision is subject to judicial review.

Article 8 of the European Convention on Human Rights says that every individual has the right to insist that the state respects her/his private and family life, home and correspondence.

A PARADIGM SHIFT
PM Modi addressing IAS officers. The service rules were changed by him after an IAS couple wanted common cadre after marriage

The Delhi High Court relied on the observations made by the House of Lords in the matter of *Huang (FC) vs Secretary of State for the Home Department* where a Chinese citizen's application seeking permission to remain in the UK where other members of her family were residing, was declined by the Secretary of State.

"We have no doubt that the right to meaningful family life, which allows a person to live a fulfilling life and helps in retaining her/his physical, psychological and emotional integrity would find a place in the four corners of Article 21 of the Constitution of India," said the division bench. The High Court on November 16, 2021, directed the West Bengal government to issue a no-objection directive for the transfer of Tanneeru to Tamil Nadu.

The Union government in July 2021 approved the inter-cadre transfer of three IAS officers on marriage grounds. One was Dr Haaris Rasheed who was transferred from the Kerala cadre to the West Bengal one on the grounds of marriage to Jameel Fathima Zeba. Another officer, Neha, was transferred from the Gujarat cadre to the Haryana cadre on grounds of marriage to Rahul Hooda. The government also approved the inter-cadre transfer of Dr Nagarjun B Gowda from the Manipur cadre to Madhya Pradesh on grounds of marriage to Srushti Jayant Deshmukh.

Further, the Delhi High Court in May 2021 directed the West Bengal government to relieve an IAS officer of the state cadre to enable her to join the cadre of her husband who is an IAS officer in Himachal Pradesh. The bench of Justice Manmohan and Justice Navin Chawla dismissed the state's petition against a decision of CAT ordering it to grant NOC to IAS officer Gandharva Rathore for the cadre transfer.

The Delhi HC had asked the West Bengal government to issue a no-objection directive for the transfer of IAS officer Lakshmi Bhavya Tanneeru to Tamil Nadu after she sought inter-cadre transfer.

Rathore made a representation to the state government in November 2017 seeking change of her cadre on the grounds of marriage to Anurag Chander on October 31, 2017. The Himachal government conveyed its no-objection to the inter-cadre transfer.

In February 2017, Prime Minister Narendra Modi had changed the service rules to allow married IAS and IPS officers to get the same cadre state. Before that there was no provision in existing guidelines for cases where officers of the All India Services can opt for the cadre of their spouses.

The matter pertains to a 2011-batch IAS officer P Parthiban who married his batchmate, Nisha, an IPS officer of the Tamil Nadu cadre, who hailed from Delhi. Parthiban, a native of Tamil Nadu, was allocated the Union Territory cadre, that includes Delhi. The couple had sought a common cadre state citing their marriage as civil services rules allow it. However, the rules bar any member of the service from working in his or her home state.

Headed by Secretary, DoPT, the matter was put up before a committee that decides cases of inter-cadre transfer and deputation which require relaxation in existing guidelines. The panel had then recommended changes in the guidelines, which has been approved by the Appointments Committee of Cabinet headed by the PM.

Interstate transfer is permitted only in the case of marriages between IAS officers. In such cases, both must apply for a cadre change citing the reason. Cadre changes have taken place mainly in the case of marriages of two IAS officers. Either one of them is sent to the cadre of another or both of them are transferred to a third cadre. ■

—By Shivam Sharma and India Legal Bureau

A ROCKY ROAD

With ongoing concerns about the massive environmental impact of the Char Dham project, did the apex court refuse to question the defense policies of the central government and seek what is called a "delicate balance" between environmental considerations and security needs?

CLEAR SIGNAL The Char Dham road project seeks to develop 889 km of road in the Himalayan region of Uttarakhand and the focus is on widening the existing roads

THE latest Supreme Court judgment on a plea filed by the NGO, Citizens for Green Doon, against the environmental clearance given by the National Green Tribunal (NGT) to widen the 889km Char Dham roads is by far a declarative for the biophilia around the country. The same set of roads is also crucial for the defence preparedness along the Sino-Indian border amidst heavy artillery movement across it.

A bench of Justices DY Chandrachud, Surya Kant and Vikram Nath modified its September 2020 order which had decided that the 2018 Ministry of Road, Transport, and Highways' (MoRTH) circular should apply. The circular said that in hills and mountainous terrains, where the traffic volumes range from 3,000 to 8,000 passenger car units a day, the carriageway width should be of the intermediate two-lane structure of 5.5m width, as opposed to the 2012 MoRTH circular which had said that in all new projects of widening/bypass/realignment, the width of the carriageway will be at least two-lane with paved shoulder of 12m width, irrespective of the traffic.

The bench, led by Justice Nariman, had accepted the minority view of the High Powered Committee (HPC) unlike the present bench led by Justice Chandrachud which opted for the majority view of the HPC while allowing the construction of two-lane with paved shoulder road of 12 m width (DLPS), which was the primary prayer of the Ministry of Defence (MoD) to meet the needs of the Indian Army.

Earlier, the NGT had observed that "one of the most pertinent observations to be made in connection with the designated route of Char Dham project is the occurrence, recurrence and kind of disaster it has witnessed in the recent past. While the 1900's record the massive 1970 flash flood incident in Alaknanda valley, similarly severe flash flood incident of 1978 in Bhagirathi valley, earthquakes of Chamoli and Uttarkashi of 1998 and 1991, respectively; the new millennia, however in just 17 years has already documented several incidents of disaster in this area. Massive land sliding incidents like the Varunavat tragedy of 2005, Bhatwadi land sinking incident of 2010, Pithoragarh landslide tragedy of 2016, severe flash flood incidents of 2004, 2012, 2013. Even in the otherwise considered stable lower altitude areas like Narendra Nagar, Rishikesh, etc have witnessed massive landslides in 2014 and 2016..."

With the recent modification of its order, alongside the ongoing concern of massive environmental impact, did the apex court refuse to question the defence policies of the central government? Did the top court seek what is called a "delicate balance" between environmental considerations and security needs?

The Court observed that there must be a significant alteration in the approach to this project by adopting sustainable measures. It directed that MoRTH and MoD can proceed with the project subject to the condition that it addressed all the concerns that have been raised by the HPC.

The report of HPC says that hill cutting is a major reason for landslides and rockfalls in the Himalayas which should be avoided by filling material on the valley side to construct roads, installation of breast walls to avoid erosion and construction of roadside drainage measures. Muck dumping is another issue of concern as most of these projects do not have dumping capacity and the waste is deposited in gorges and natural drains as no financial provision and guidelines for the safe disposal of muck have been provided by MoRTH. The HPC has recommended that dumping should be located downwind of habitation and protection measures must be constructed before muck dumping begins.

> The NGT, while dealing with the Char Dham project matter, had already raised concerns about numerous flash floods, earthquakes and landslides following development activities in Uttarakhand.

The report discusses the concerns over disaster management measures that must be undertaken to prevent any disasters that can occur as a result of the project. A comprehensive study must be carried out, vulnerable muck dumping sites must be identified, natural streams must be relocated and climate vulnerability risk assessment must be conducted to prevent such disasters. The HPC report also asserts the need for remedial measures, such as maintenance of wildlife and water resources, the constant monitoring of MoRTH, and dialogues on the projects' effect on socio-cultural communities.

The Court further observed that the Union government is empowered to declare any road as a national highway and issue directions for its development and maintenance. Within the Union government, the specific responsibility lies with MoRTH.

The 2018 MoRTH circular modifies its precursor of 2012 for hilly and mountainous terrains in the following ways: (i) Carriageway width cannot be of DLPS configuration but must be of Intermediate Width (IW standard) (i.e., 5m); (ii) adequate passing places with 2.5m width have to be included; (iii) for areas where the PCUs are more than 10,000 per day (or expected to reach that level within 3 to 5 years), the carriageway width could be of double lane configuration (i.e., 7m); and (iv) where the traffic is likely to increase by more than 10 percent per annum, the width could be of DLPS configuration.

The 2020 MoRTH circular amends the 2018 circular in as much as it modifies the standards prescribed for roads in hilly and mountainous terrain which act as feeder roads to the Indo-China border or are of strategic importance for national security, in view of the suggestions received from the MoD and subsequently issued 2019 IRC guidelines.

The Court after reading the three MoRTH circulars and 2015 & 2019 IRC guidelines concluded that if a road is a strategic or a border road serving as a ▶

The bench of (from left) Justices DY Chandrachud, Surya Kant and Vikram Nath, while modifying its earlier order, directed that the centre can proceed with the project provided it addressed concerns raised by the High Powered Committee.

feeder road to the Indo-China border and is going to be used for "military/paramilitary/security forces operations/movements for national security", then it must be of DLPS configuration if it is a national highway, other than in hilly or mountainous terrain, the national highway can be of DLPS if there are more than 10,000 PCUs per day or that level will be reached in 3 to 5 years, in hilly and mountainous terrain, where the traffic is likely to increase over 10% per annum.

Though, the NGO argued that the three strategic border roads (from Rishikesh to Mana, Rishikesh to Gangotri, and Tanakpur to Pithoragarh) are sufficient to meet the needs of the Army, and any further development made should be done taking into consideration the fragility of the Himalayas and the excessive damage done to the environment, the Court swung towards the Army's infrastructural needs with better disaster-resistant roads.

The Court observed that the competing interests that the HPC had to evaluate were environmental concerns against infrastructural development, the primary reason of which in this project was focused on increasing tourism, providing an impetus to the economy and ease of transportation for undertaking the Char Dham pilgrimage. Balancing the interests of defense against environmental considerations was outside the ambit of the HPC.

However, the Court did agree that the majority of the members of the HPC recommended the adoption of the DLPS standard as road-width for the project. The Court modified the 2020 order to the extent that the three feeder roads connecting LAC are permitted to be widened. It further granted liberty to the centre to pursue appropriate proceedings and seek relief in the event that it is necessary to implement the DLPS standard for the entire project—The Chardham Mahamarg Vikas Pariyojna.

The Court dismissed the argument based on the minority report of its own HPC that a disaster-resilient, intermediate road width was much more critical than a wider road "prone to frequent blockages, landslides and recurring slope failures" for the country's defense needs. It observed that in the exercise of judicial review, it could not "second-guess the infrastructural needs" of the armed forces. The challenge to the circular required the Court to interrogate the policy choice of the establishment which is entrusted by law with the defence of the nation. "This is impermissible", the Court said.

The Court referred to various judgments, *Essar Oil Ltd. vs Halar Utkarsh Samiti*, referring to the Stockholm Declaration while elucidating on the principle of sustainable development. It noted that while socio-economic needs could be fulfilled through development, environmental concerns will always remain. In the Central Vista project, it was highlighted that development should be sustainable and not environmentally degrading; *Hanuman Laxman Aroskar vs Union of India* emphasised environmental governance within a rule of law paradigm in a challenge to the construction of Mopa airport wherein the MoEF&CC gave the project environmental clearance while the Court found a lack of information transparency in the disclosures filed by project proponents, and directed a fresh exercise for a rapid EC to be carried out.

The Court found that concern for national security is the need of the hour. Such concerns may change from time to time. However, sustainable development should be the key to upholding the environmental rule of law. The challenge in deciding this case was reflected in the Court's judgment of balancing the needs of defence and protection of the environment. ■

—By Akarsh Sharma and India Legal Bureau

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A Case for Independent Prosecutors

The Chief Justice of India's recent remarks that historically prosecutors in India have been under the control of the government, so it is not a surprise that they do not act independently, is a timely indictment of the system

By Sujit Bhar

Amitava Sen

"The public prosecutors do nothing to prevent frivolous and non-deserving cases from reaching the courts. They automatically oppose bail applications, without independently applying their mind and attempt to suppress evidence during trial which could benefit the accused."

—Chief Justice of India NV Ramana while delivering a lecture in Vijayawada recently

RECENTLY, during his 5th Late Shri Lavu Venkateswarlu Endowment lecture in Vijayawada, Chief Justice of India (CJI) NV Ramana espoused a very fine hypothesis—the need to liberate the institution of public prosecutors. While this (freedom) is an established concept in many developed economic and social systems, including the UK and especially the US, it is a somewhat foreign concept for India. Practitioners of law and litigants in this country have suffered enough for this (lack of freedom).

Within what the chief justice accepted as India's "Dysfunctional Criminal Justice System," Justice Ramana insisted that "total independence must be granted to them (public prosecutors) and to make them answerable only to the courts."

While a comparative study becomes necessary, it would be wise to first concentrate on what the CJI said. He reiterated: "Historically, prosecutors in India have been under the control of the government. Hence it is not a surprise that they do not act independently. They do nothing to prevent frivolous and non-deserving cases from reaching the courts. Public prosecutors automatically oppose bail applications, without independently applying their mind. They attempt to suppress evidence during trial which could benefit the accused."

He went on to add: "A holistic rework needs to be undertaken. In order to insulate the public prosecutors, an independent selection committee may be constituted for their appointment. Best practices should be adopted after a comparative analysis of other jurisdictions. The responsibility of a public prosecutor is immense. They act as gate keepers who ensure that rights of citizens are not sacrificed and that citizens are not harassed through malicious prosecutions."

Public prosecutors in India are appointed by the governments with just a consultation clause. The prosecutor is answerable to the government and this plays havoc with the independence principle.

This is a very extraordinary suggestion. It could jolt the rickety justice system of the country, made even more rusty through continuous political intervention at all levels. However, the road is full of hurdles. Consider the police force, the first conscience-keeper of the nation, the first gateway to the justice system. We all know the fate of the *Prakash Singh vs Union of India* (2006) case judgement of the Supreme Court, or how free the police forces of the country are at this moment, despite such a landmark judgment.

To realise the extent of change the CJI was hinting at, one needs to see how the independence of such prosecutors have been guaranteed and maintained in developed nations.

THE UK EXPERIENCE

In the UK, the prosecution is handled by the Crown Prosecution Service (CPS). CPS has a unique position, which is termed as "Prosecuting in the public interest: independence without isolation". This is an apt description given by Max Hill QC, who was Director of Public Prosecutions in 2020. The idea is to "remain independent while also being collaborative, responsive and adaptable in a changing world." In an essay, he says: "Independence was one of our founding principles when the CPS was created in 1986, and it has remained the central thread in our story. An independent prosecutor—by which I mean, a prosecutor free to apply the law fairly and without bias, and without external pressure intended to influence decision-making—is essential to the rule of law."

He elucidates: "...but from whom are we independent, and why? First, we are independent of investigators—in most of our cases that means the police, though it also includes the National Crime Agency, Her Majesty's Revenue and Customs and others... Until our creation in 1986, criminal offences in England and Wales were prosecuted by a hap- ▶

hazard mixture of people. Would-be prosecutors then included private individuals, police officers or police solicitors, county prosecutors and local firms of solicitors."

His explanation strikes at the roots of the criminal justice system and how investigators at different levels and by different agencies can really make a mockery out of a case, as was evident in the Sushant Singh Rajput case. The sheer multiplicity of investigations—including, in one instance, two police forces from two states, acting against each other—by multiple investigating agencies completely muddled up the moot purpose of the investigation. Apart from Mumbai Police and Bihar (Patna) Police, involved were the Central Bureau of Investigation (CBI), the Enforcement Directorate (ED) and the Narcotics Control Bureau (NCB). None of the agencies have brought out a concrete report on Rajput's death so far.

In the UK, the prosecution is handled by the Crown Prosecution Service. Max Hill QC, Director of Public Prosecutions in 2020, says that the idea is to "remain independent while also being collaborative, responsive and adaptable in a changing world".

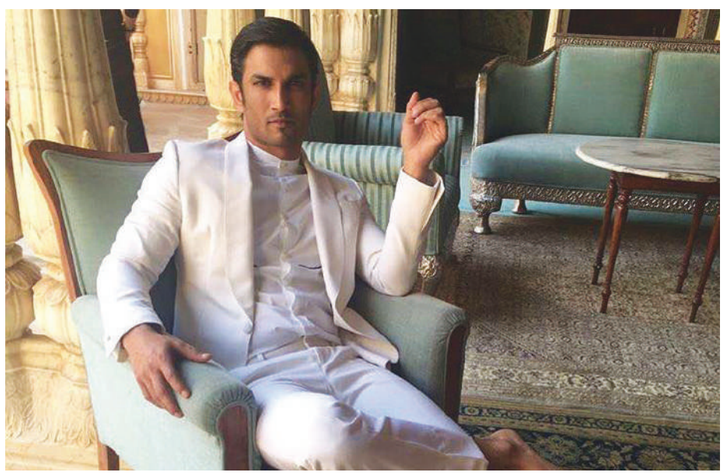
It was finally left to the court to sift through thousands of pages of inane and unfounded allegations. To what end the many investigating agencies were engaged in is still not clear. Frankly, this is not the job of the court. Ideally, it would be the job of an independent prosecutor to see to it that the laws are applied uniformly and without bias.

Hill also makes it clear that "the CPS is also separate from every other government body, and our prosecution decisions are independent of political influence."

Justice Ramana hit the nail right on the head when he dissected the investigating process as well. He added: "Another facet of the criminal justice system that needs to be changed relates to investigators. There is absolutely no system of accountability in place for faulty and inordinately delayed investigations. A person wrongfully incarcerated due to false implication loses his right to liberty, property, etc. He suffers enormously. There is no real remedy left for him and no compensation whatsoever even after an acquittal."

Think of the scope of that statement. The entire system needs a complete overhaul, he implied. This is a Herculean task, something that cannot be completed without the involvement of the legislature and the executive. However, if the justice system has to step into these large shoes, so to say, in this country, it has to strive to reach the levels of independent prosecutors that the US has.

In India, possibly the appointment process might be faulty, which is why the CJI has asked for an independent process, as is followed while appointing the Chief Election Commissioner (CEC) and his deputies. In India, Section 24 of the CrPC describes the appointment of the public prosecutor. In High Courts, a public prosecutor is appointed by the central government or the state government with their consultation, and if required, can also appoint an additional public prosecutor on behalf of them. The appointment, coming directly from the governments (despite the consultation clause) has meant that the prosecutor is answerable to the governments and that plays havoc with the independence principle, if it ever existed.



A MUDDLED PROBE
The investigation at different levels and by various agencies made a mockery of the Sushant Singh Rajput case

THE US EXPERIENCE

There is a belief that the US system is the ideal. Says an analyst: "The American prosecutor enjoys independence and a wealth of discretionary power unmatched in the world. With few exceptions, the prosecutor is a locally elected official and the chief law enforcement official of the community. The American prosecutor represents a local jurisdiction and his or her office is endowed with unreviewable discretionary authority. Nowhere else in the world does this combination of features define prosecution."

What are the powers of a US prosecutor? As an independent analyst has pointed out: "A prosecutor is not the representative of the victim, not of the accused, even not of the government, but he/she is the spokesperson rather agent of the people of the country in its real sense." That is a position that no arm of the Indian government might want to accept.

But is the American system fair? The American prosecutor has almost unlimited powers. However, this may have led to other problems. According to the American Civil Liberties Union (ACLU): "Prosecutors (in the US) have used their power to pack jails and prisons. And it has taken decades, billions of dollars, and thousands of laws to turn the United States into the largest incarcerator in the world."

So, that becomes a human rights problem of mammoth proportions. ACLU cites four issues that need to be looked into deeply.

The American prosecutor has almost unlimited powers. He/she decides whether someone will have to pay for getting bail. The prosecutor also has the power to recommend freedom.

The first is bail. Quite like in India, ACLU points out that "the US' wealth-based incarceration system allows those with money to walk free before trial, while those who can't make bail remain locked up. Guess who decides whether someone will have to pay bail? Believe it or not, the answer is often prosecutors. But they also have the power to recommend freedom."

That sounds scary, and a good lesson for us when we do decide to accord freedom to our prosecutors.

Then comes the issue of charging of an accused. It is the prosecutor who decides whether to prosecute and what to charge the accused with. Often times, such charges have proven to be "harsh and discriminatory" and this could emanate even from personal likes and dislikes. There is no way of assuring the neutrality—regarding race, creed, social position—of a prosecutor.

Last, but not the least is the American system of plea bargains. ACLU points out that "nine out of 10 cases are resolved by plea bargain." This, principally, is because of the harsh criminal laws, such as mandatory minimum sentences. Such mandatory sentences have reduced the discretionary powers of the judges too, handing the prosecutor all the negotiating power instead. What has happened is that an overwhelming number of people plead guilty, even when innocent, out of fear of a negative outcome at trial.

However, the most important protective armour given to American prosecutors is that almost all of them are elected officials, not appointees. Hence the prosecutor's accountability is to his own constituency, so to say, not the government. While this should probably be the ideal situation, it also hands the prosecutor more than an ideal amount of power.

With these examples in front of us, should the republic decide on the freedom of the prosecutor and set up an appointment panel, there needs to be more checks and balances in place.

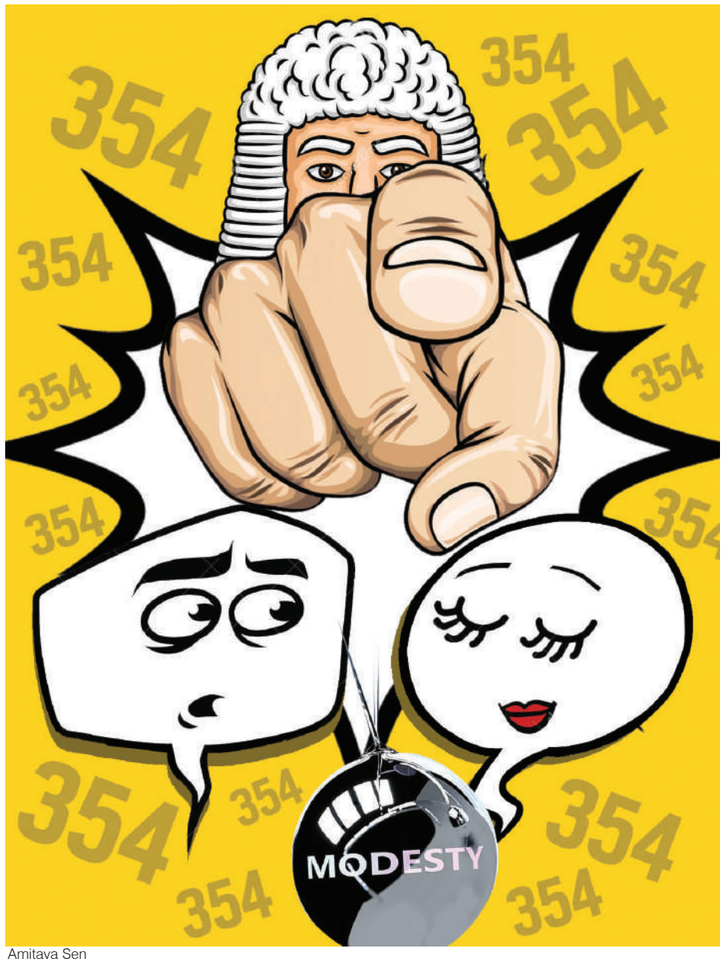
This comes from our experience of the CEC, as said before. Today, there have been doubts cast on how neutral the actions of the CEC have been. Other so-called neutral and independent organisations of the country have faced the same fate.

One hopes this suggestion is accepted in the right spirit and with haste. If one considers only the pendency issue of the courts, the justice system could do with a bit of help. ■

The author writes on legal, economic and corporate issues, apart from social commentary. He is Executive Editor at India Legal

Consent is Supreme

The Aurangabad bench of the Bombay High Court recently held in a case that touching the feet of a woman by a stranger without her consent amounts to outraging her modesty under the Section



Amitava Sen

THE Aurangabad bench of the Bombay High Court in a recent judgment addressed a delicate matter while expanding the definition of "outraging the modesty of a woman". The criminal revision application of Parmeshwar Dhage, the accused, who was convicted by the trial court for "touching the feet of a woman while she was asleep", was set aside by a single judge bench.

Justice MG Sewlikar in the case of *Parmeshwar Dhage vs the State of Maharashtra* made a significant observation, stating that "touching any part of the body of a woman without her consent that too in the dead hour of the night by a stranger amounts to violation of modesty of a woman." The Indian Penal Code 1860 makes it a punishable offence, as stated under Section 354: "Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

According to the facts of the case, around 11 pm on July 4, 2014, a 25-year-old married woman from the Jalna district in Maharashtra felt that someone was touching her feet. She awoke and found that Dhage was sitting near her feet on her bed. She shouted which woke up her grandmother-in-law and they raised an alarm.

While narrating the events of that night in the High Court, the woman said that only she and her grandmother-in-law were in the house as her husband had gone to another village. Around 8 pm, Dhage went to the woman's house and inquired as to when her husband would be returning. She informed him that her husband would not be returning for the night. The same night, the woman closed the main door but didn't bolt it. Both the women then went to sleep. A complaint was later lodged by the woman on July 5, 2014 at Partur police station in Maharashtra.

The Indian Penal Code doesn't explain or elucidate on what it means by "modesty". However, the apex court in the *Rupan Deol Bajaj and Anr vs KPS Gill and Anr AIR 1996* has defined the term "modesty". During the discussion in the case, the question of modesty arose under *State of Punjab vs Major Singh, AIR 1967 SC 63*, where the Supreme Court bench, comprising Justice RS Bachawat and Justice JR Mudholkar, while responding to the question as to whether a girl child of seven and half months old possesses "modesty" which could be outraged, said that whenever any act is done to or in the presence of any woman which is plainly suggestive of sex or any sexual act in consonance with the common notions of the mankind, that must fall within the mischief of Section 354 of the Indian Penal Code.

Further, Justice Bachawat noted that the sex of a woman is the very essence of her modesty and a woman possesses modesty from her very birth being the attribute of her sex. Mentioning the dictionary meaning of the word "modesty" and the interpretation of the word in *Major Singh*'s case delineated by the Supreme Court, any action which is capable of "shocking the decency of a woman" could be perceived as the ultimate test to ascertain as to whether the modesty of a woman has been outraged.

When the above test is applied to the facts of *Parmeshwar Dhage vs the State of Maharashtra*, it is amply clear that the act of Dhage, wherein he was sitting near the woman's feet on her cot and touching her feet at such a late hour, was clearly capable of "shocking sense decency of any woman."

Some judges have given a different interpretation on the issue. The controversial verdict in 2021 given by Justice Pushpa V Ganediwala, the Additional Judge in the Bombay High Court, had sparked a huge uproar in society as well as amongst the legal fraternity. She held that a "skin-to-skin" contact is necessary in order to attract charges under the provisions of the Protection of Children from Sexual Offences (POCSO) Act.

Justice MG Sewlikar ruled that the conduct of the accused showed his sexual intent as there was no feasible reason for his presence in the house of the woman at such odd hours.

However, the "skin-to-skin" verdict of the Bombay High Court was set aside by the apex court which said that it was a narrow interpretation of the law and held that any physical contact made with a sexual intention comes under the purview of POCSO. Hence "skin-to-skin" contact is not the only criteria to decide if the child is sexually abused or not.

Justice Sewlikar observed that the conduct of Dhage distinctly smacked of his sexual intent towards the woman as there was no feasible reason for his presence in her house during such odd hours of the night. Moreover, the counsel appearing on behalf of Dhage could not provide a satisfactory explanation for his presence in the woman's house.

Justice Sewlikar also stated that it amounted to violation of modesty of a woman when a stranger especially in the dead hours of night, touches any part of the body of a woman without her consent.

Justice Sewlikar observed that Dhage did not enter the woman's house with any reasonable cause. As part of his pre-hatched plan, he had made sure that the husband of the woman was not returning for the night by making a casual inquiry that same evening and later he ventured into the house.

The judge noted that the above details were enough to establish the fact that Dhage went there with a sexual intent and thus violated the modesty of the woman. Hence the judge held that there was no error committed by the trial court in holding Dhage liable for molesting the woman.

Pratik Bhosle, the counsel appearing for Dhage, contended that he was not present at the spot of the incident on the particular night as he is a resident of Jalna District. The counsel further pointed out that the door was not bolted from inside when women who are alone in the house usually bolt the door from inside. The delay in filing the complaint was also mentioned by the counsel, as it was lodged after 12 hours.

Replying to the objections raised by Dhage's counsel, the counsel for the woman, SW Munde, said that the incident took place around 11 pm, so the woman waited for her husband to return from another village and then lodged a report on his arrival, hence the report was lodged late.

The judge remarked that the conduct of the woman cannot be faulted as she chose to wait for her husband to return and then filed a report. Hence, there was no frailty in the appreciation made by the trial court. On the other hand, Munde supported the judgment of the trial court sentencing Dhage to imprisonment for one year while convicting him for offences committed under Section 451 for house trespass and Section 354A for sexual harassment under the Indian Penal Code. ■

—Mansi Sharma and India Legal Bureau

Long Wait for Justice

The High Court's order of acquittal of a murder convict comes 38 years after the incident took place. During the lengthy pendency of the case, five other accused who had also filed an appeal died. The abnormally lengthy timeline reflects the intricacies of the judicial system

THE Allahabad High Court, on December 24, 2021, acquitted a murder convict in a 38-year-old case and sent the other to the Juvenile Justice Board to determine the fine imposed. The Division Bench of Justice Manoj Misra and Justice Sameer Jain set aside the conviction awarded to appellant Saleem by the trial court and acquitted him of all charges. The Court, however, was of the view that appropriate punishment ought to be awarded to another appellant Brijendra Singh—who had claimed during the pendency of the appeal that he was a juvenile on the date of the incident, July 12, 1980—by imposing a fine.

Brijendra Singh and Saleem were convicted on September 29, 1983, by an order passed by 2nd Additional Sessions Judge, Farrukhabad (*State vs Harnath Singh and others*) and awarded life imprisonment for offences committed under Sections 302/149 of the Indian Penal Code as well as six months' rigorous imprisonment for offences committed under Sections 147 and 323 of the Indian Penal Code.

The case of the prosecution was that on July 22, 1980, at about 9.30 am, Kanchan Singh lodged an FIR against Brijendra Singh, Saleem and five other co-accused at police station in Kannauj district of Farrukhabad, Uttar Pradesh. As per the FIR, on July 22, 1980, at about 7 am, when the nephew of Kanchan Singh (the informant), Dhirendra Singh, was returning after attending the nature's call, Brijendra Singh and Saleem along with five other co-accused confronted him, and co-accused Harnath Singh fired at Dhirendra Singh with his licensed gun while another co-accused Aditya Singh opened fire from his country-made pistol, which hit Rajendra, the son of Kanchan Singh. In the incident, Dhirendra Singh died. The incident was said to have taken place due to long-standing enmity between both the parties. It was further stated in the FIR that a number of civil and criminal cases against the parties were pending in court.

A CASE FOR PENDENCY The Allahabad High Court (right) delivered the judgment in the 38-year-old murder case on December 24, 2021

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Justice Manoj Misra (left) and Justice Sameer Jain set aside the conviction of appellant Saleem by the trial court and acquitted him of all charges. The bench, however, said that appropriate punishment ought to be given to another appellant Brijendra Singh.

It was the case of the prosecution from the beginning that after commission of the offence, Saleem along with other accused entered the house of another co-accused Shivnath Singh to hide and the villagers surrounded the house of Shivnath Singh. This indicates that there was no scope for Saleem to escape from the house of Shivnath Singh.

As per Section 149 IPC, to convict a person under the Section, it is necessary to prove the following allegations—(1) the offence is committed by any member of an unlawful assembly, (2) the offence must be committed in prosecution of the common object of an unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object. The role of causing firearm injuries to Dhirendra Singh (the deceased) was specifically attributed to co-accused Harnath Singh while the role of causing firearm injury to injured Rajendra Singh was attributed to accused Aditya Singh.

The Court held that as per Section 146 IPC, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. In view of the above discussion, the Court allowed the appeal filed by Saleem and set aside his conviction awarded by the trial court under Sections 302/149, 323 and 147 IPC and acquitted him of all the charges.

As far as the appeal filed by Brijendra Singh is concerned, the Court partly allowed his appeal and set aside his conviction under Sections 302/149 IPC, but his conviction under Section 147 IPC was maintained. The Court also set aside the conviction of Brijendra Singh awarded by the trial court under Section 323 IPC, but convicted him under Section 323/149 IPC. On his plea, the Court on February 26, 2018, directed the Juvenile Justice Board to hold a proper enquiry in accordance with the law as provided under the Juvenile Justice (Care and Protection of Children) Act, 2015, to ascertain whether on the date of the incident, Brijendra Singh was a juvenile or not.

The Juvenile Justice Board in its enquiry found that the age of Brijendra Singh on the date of incident, July 22, 1980, was 17 years 9 months and 13 days and submitted its report on October 12, 2018. In spite of the opportunity to file an objection to the report of the Juvenile Justice Board, dated October 12, 2018, no objection was filed.

The Court observed that, "when we compare the provisions of Section 21 of Juvenile Justice Act, 1986, with the provisions of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015, we find that there exist similar provisions for orders that could be passed in respect of a juvenile in conflict with the law, including direction to pay fine. Hence, by applying the law laid down by the apex court in *Jitendra Singh*'s case (*supra*) and by keeping in mind the provisions of Section 18(1), the original appeal against the conviction was filed by the seven accused. Of the seven, only Brijendra Singh and Saleem survive."

The juvenile appeal was seen in another case 40 years after the incident. The Lucknow bench of the Allahabad High Court declared a 56-year-old accused as a juvenile, sentencing him to punishment already undergone in a case of culpable homicide not amounting to murder. The High Court decided the plea of juvenility of the convict on the direction of the apex court and the order was passed by a bench comprising Justice Ramesh Sinha and Justice Vivek Varma.

The Juvenile Justice Board, Ambedkar Nagar, in October 2017, had declared the convict, Sangram, a juvenile, but while deciding the appeal finally on October 11, 2018, the High Court did not consider this fact. The High Court, in fact, had partly allowed the appeal of convicts Ram Kumar and Sangram by upholding the conviction, but modifying the sentence under Section 304 (1) of IPC sentenced them to undergo 10 years in jail.

Sangram challenged the High Court verdict in the Supreme Court, pleading that the High Court committed a grave error in deciding the appeal against him without considering his plea of juvenility that can be raised at any stage of the criminal proceedings. The Supreme Court on August 27, 2021, remitted the matter back to the High Court for deciding the plea of juvenility. The wheels of justice continue to turn slowly. ■

—By Adarsh Patel and India Legal Bureau

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Not a Foolproof System

The new Election Laws (Amendment) Bill, 2021 proposes to link electoral rolls with Aadhaar to curb multiple enrolments of the same person at different places. But it also runs the risk of identity theft

ESTABLISHING IDENTITY The law allows electoral registration officers to seek the Aadhaar number of those who want to register as voters

SANTOSHI died crying "*Bhaat*, *Bhaat*, *Bhaat*!" These were the cries of an 11-year-old girl, as recounted by her mother. The girl allegedly died of starvation in Jharkhand in September 2017. She had been told by the public distribution shop that no rice (*bhaat* in the local language) would be given to her as her family had not linked their ration cards with Aadhaar.

The death of Santoshi is not just a collective shame, but shows us the potential challenges if the Aadhaar linking is made mandatory. This also becomes relevant in the backdrop of the Election Laws (Amendment) legislation, piloted by the minister of law and justice in the winter session of Parliament. President Ram Nath Kovind has given his assent to Election Laws (Amendment) Bill, 2021.

The law will allow the youth to enrol as voters on four different dates every year and proposes to link electoral rolls with Aadhaar to curb multiple enrolments of the same person at different places.

However, linking Aadhaar is not mandatory but optional. The legislation allows electoral registration officers to seek the Aadhaar number of those who want to register as voters. As per the government, these reforms are the demand of the time and will benefit the electoral system.

Now, the question that arises is: if the linking of Aadhaar is not mandatory, then what is the problem? Does this new legislation disenfranchise voters at the grassroots level? Could this lead to the government using voter identity? What could be the potential ramifications of this exercise on data security?

According to former Chief Election Commissioner SY Quraishi, seeding Aadhaar with voter ID was not such a desperate need when other pressing reforms were pending. He said: "Every duplicate voter is not a bogus voter. It is just that the name is mentioned at several places as one has moved residence several times. There are already enough safeguards for fake voting and impersonation with the Election Commission of India." He said there are other ways the Election Commission of India can weed out duplicate voters. "As the linking of Aadhaar with voter ID is not mandatory, a fake voter will not share his Aadhaar credentials. How will this help the ECI weed out fake voters?"

Quraishi said the practical details have not been explained and the Aadhaar data bank will have to be made available to the Election Commission of India. The potential for data misuse by officials is possible and innocent people may be misled into showing their Aadhaar.

According to the World Bank, over 1.1 billion people across the world are unable to prove their identity and therefore lack access to vital services, including healthcare, education and social protection. As per a study, a single form of ID actually disenfranchises citizens and removes them from the welfare and electoral system.

A study of voter ID requirements in Latin America revealed that countries with a single form of ID were likely to have fewer citizens participating in the electoral process as they were unable to prove their identity.

As per senior journalist NK Singh, determining the voting identity with a single identity is a faulty proposition. The linking of ration card with Aadhaar in India has also shown inefficiencies with the lack of technology. He said: "A democracy like India cannot afford the bureaucratic wisdom in seeding Aadhaar with voter ID as it will deny them voting rights."

He said: "This is a clear indication of the State expanding its predatory instincts, and making Aadhaar voluntary is the first step. In the long run, this could have wider ramifications." He further said that the Election Commission of India can do all the checks and balances but once a person is on the voter list, there should not be any step that denies them the right to vote. "The problem is with the system. The government failed to make any foolproof voter IDs or any other identity. There are reports that fake Aadhaars are being made. The government needs to work in that direction."

Moreover, data security is a grave concern with this linking. If that happens, it could undermine the voting process and have an impact on Indian democracy.

> As the linking of Aadhaar with voter ID is not mandatory, a fake voter will not share his Aadhaar credentials. How will this help the Election Commission weed out fake voters?"
>
> —Former Chief Election Commissioner SY Quraishi

> "If the government wants to join Aadhaar with voter ID, it is doing so without any reference to cyber security methodologies.... Any breach in the Aadhaar ecosystem could be very costly"
>
> —Cyber law expert Pavan Duggal

> "A democracy like India cannot afford the bureaucratic wisdom in seeding Aadhaar with voter ID as it will deny them voting rights. This is a clear indication of the State expanding its predatory instincts..."
>
> —Senior journalist NK Singh

As per cyber law expert Pavan Duggal, the objective behind the law is noble but there are many challenges in its implementation. These should be addressed in order to give full effect to the letter and spirit of the law. "Aadhaar is a double-edged sword because it entails biometric information. Therefore, if the Aadhaar ecosystem is compromised, it could open a Pandora's Box." India has an immense policy vacuum, he said, as the country doesn't have any dedicated law on cyber security, data protection or privacy. So in the absence of punitive legislation, India becomes a very fertile ground for hackers, he added.

He said: "India has received a massive increase in cyber attacks, cyber security breaches and these are often not getting recorded. If the government wants to join Aadhaar with voter ID, it is doing so without any reference to cyber security methodologies, processes and procedures."

Duggal said the biometric information of Aadhaar was saved under the central identity data depository which is relatively safe. But ever since the government joined other systems with Aadhaar, the ecosystem has become big and relatively unsafe and insecure. "If there is any breach in the Aadhaar ecosystem, that could be very costly. Not only from the perspective of the individual, but also from the country."

For example, if an individual's Aadhaar-voter ID is compromised or breached, cyber criminals can automatically connect Aadhaar with the voter ID and these IDs can be used to commit various cyber crimes like identity theft.

Now that the bill is passed, it is time that the government takes appropriate steps to ensure that unauthorised cyber security breaches with the intersection of Aadhaar and voter ID do not exist. ■

—By Sambhav Sharma and India Legal Bureau

Prince Harming

It is turning out to be the scandal of the year, or even longer depending on how the courts rule. The big scandal till now was the accusation by American Virginia Giuffre (right, middle) who filed a case against Britain's Prince Andrew (right) and disgraced financer Jeffery Epstein claiming she was sexually assaulted by both Epstein and Andrew, starting when she was 17. She had filed a separate civil lawsuit against Andrew in which she said she was required to have sexual contact with Epstein and his associate Ghislaine Maxwell (far right) and several of their adult male friends "including royalty, politicians, academicians, businessmen..." The inclusion of the word "royalty" is, in the view of Andrew's attorneys, a clear reference to the Prince.

Now comes another twist in the legal tale. A federal judge unsealed a confidential 2009 settlement between Giuffre and Epstein to release "any other person" involved in the case from litigation in exchange for $5,00,000." Prince Andrew has vehemently denied the allegations and his attorneys have also argued that the settlement agreement precludes Giuffre from suing the royal because it covers "potential defendants" from all legal actions taken by Giuffre. Whether that argument will be successful depends on the definition of the agreement's intended beneficiaries.

Giuffre's lawyer argues the royal was not named in the agreement and could not be released as a beneficiary of the settlement, which defines "second parties" as Epstein's "agent(s), attorney(s), predecessor(s), successor(s), heir(s), administrator(s), assign(s) and/or employee (s)." That would not appear to include Prince Andrew.

Epstein committed suicide in a Manhattan jail while Maxwell was convicted on charges related to the abuse and trafficking of underaged girls. Maxwel faces decades in prison while the case against Prince Andrew remains a royal question mark.

French Fries

As France braces for general elections in April, the heat is already building up. A large European Union flag attached to the Arc de Triomphe (left) in Paris last week to mark the start of France's six-month presidency of the bloc was removed in the midst of protests and rallies by far-right leader Marine Le Pen (inset).

"The government has been forced to remove the EU flag from the Arc de Triomphe, a beautiful patriotic victory at the start of 2022," Le Pen said on Sunday. The government stated that the flag was removed according to the timeline it has set and had nothing to do with the protests and objections by the far right.

French President Emmanuel Macron, who has yet to say if he will run for re-election, defeated Le Pen in a 2017 run-off by 66%-34%. Most polls show there will be a rematch between the two in the upcoming presidential election, with Macron expected to win again, albeit with a slimmer margin.

Fake it Till you Make it

Silicon Valley is synonymous with hi-tech start-ups that earned investors millions. Now comes a warning sign that has badly shaken the confidence of those looking for investment opportunities. In Silicon Valley, when a start-up is in its infancy, investors are often looking at people and ideas rather than substantive technology. The hope is that the technology will come with the right concept—and the right people to make it work.

Elizabeth Holmes (right) was brilliant at selling that dream, following a very Silicon Valley practice. The start-up she founded, Theranos, attracted hundreds of millions of dollars in investments, including by people like Rupert Murdoch. Yet, the company has collapsed and she faces a jail sentence after it emerged that the company she built was based on fantasy science.

The technology Theranos was producing—supposedly testing for hundreds of diseases—attracted attention and investors till some who used the company's tests, including a cancer patient, say they were misdiagnosed.

Holmes has now been found guilty for conspiring to defraud investors.

In Silicon Valley, hyping up your product isn't unusual, and Holmes was clearly very good at it. She managed to project confidence in selling the dream that the technology would change the world.

Last month, Silicon Valley phone app startup HeadSpin's CEO and founder, Manish Lachwani, was arrested for allegedly defrauding investors. Silicon Valley's tech giants are based on "proprietary" systems that cannot yet be revealed or peer-reviewed, the ideal environment where claims that aren't true are left unchallenged.

Virtual Waiter

It could only happen in Dubai. Opaala, a cloud-based platform launched by Giles Wright and Marwan Saab in 2019, promises to deliver a menu that's been created specifically for you. The online restaurant provides bespoke menus for individual diners by offering their favourite dishes, taking allergies and dietary requirements into account.

The owners say Opaala is like a virtual waiter. Customers get the menu in their phone, in their hand, tailored to their dietary needs and favourite dishes. They can ask for the bill, they can pay their bill, or they can put an order through directly to the kitchen. Customers scan a regular QR code for all this service. The duo call the platform a "dynamic menu".

By using AI and machine-learning, Opaala can track a user's eating habits and create increasingly personalised menus over time. The data is not only improving the user experience, other restaurants are using Opaala's analytics to adjust their menus according to diners' preferences.

The company has flourished since the Covid-19 pandemic as restaurants around the world turned towards contactless solutions. That suited Opaala's technology just fine. It was contactless, paper-free, and cloud-based smart technology did the rest. Opaala's success has allowed it to open around 350 venues in 14 countries over the last three years.

AMERICA'S CULTURE WAR

About 50 of the more than 720 people charged in the Capitol invasion and destruction have been found guilty, although punishments have tended to be lenient despite the deaths and millions of dollars in damages. Lawyers are finding plenty of work on all sides of this conflict

By Kenneth Tiven in Washington

UNI

RELENTLESS OFFENSIVE
Despite glaring evidence pointing towards Donald Trump's involvement in the Capital riots last year, the culture war still continues

AS we reach the first anniversary of what appears to have been a self-actuated coup by the Donald Trump administration, no court in the land at any level has found in favour of any law suit or action that substantiates claims that the 2020 presidential election in the United States was stolen from the former president. Has that caused the former president and his supporters to back away from the culture war he launched in 2017 against anyone who did not agree with him? Apparently not in the least.

The Brookings Institution recently issued a report titled *Competing Visions of America* that said 80% of Republicans surveyed believe that "America is in danger of losing its culture and identity. In contrast just 33% of Democrats agreed. It also said that 70% of Republicans think that "American culture and way of life have changed for the worse since the 1950s" which barely skirts being a racial attack. Consider that 60% of Democrats said they thought America had changed for the better.

Is this a strategy for winning back control of the House and Senate in the 2022 mid-term elections? The GOP thinks so, issuing a memo to its Congressional delegation to "lean into the culture war".

Trump ran in 2020 with no party platform, merely a continuation of what had been the raging culture war from 2016. The Trump claim that any loss was due to fraud and cheating began before the voting in 2016 when he expected to lose to Hillary Clinton. It didn't help him beat Joe Biden, but the righting media doesn't want to talk about the insurrection, just cultural issues, or what we used to call wedge issues.

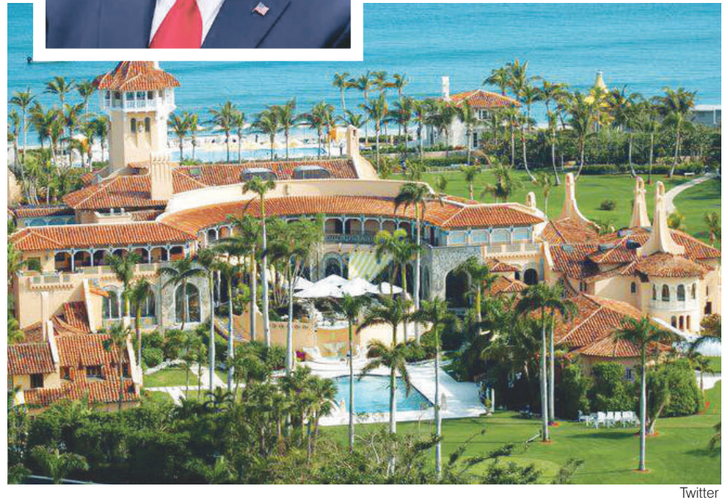
Trump's grievances are clearly spelled out in a daily barrage of emails, since he no longer has access to Twitter. The grievance list (in italics) from Trump this week is speculative at best and an outright fabrication at the worst.

PRESSURE TACTICS
According to a recent report, 80% of Republicans (right) believe that America is in danger of losing its culture and identity

Twitter

Have you noticed that the Radical Left is now admitting President Trump was right about everything they LIED about before the Election?
Reality: Democrats are NOT saying that.

SPREADING CANARDS
Donald Trump keeps issuing emails, attacking Democrats, from his Mar a Lago estate and club (below) in Florida



Twitter

Hydroxychloroquine works.
Reality: Most scientific studies said it doesn't work

The China Virus came from a Chinese lab.
Reality: It came from China, source not defined.

Hunter Biden's laptop was real.
Reality: But contents not indicative of anything

Lafayette Square was not cleared for a photo-op.
Reality: It was, with Trump holding a Bible upside down to make a point.

The "Russian Bounties"story was fake.
Reality: Unclear

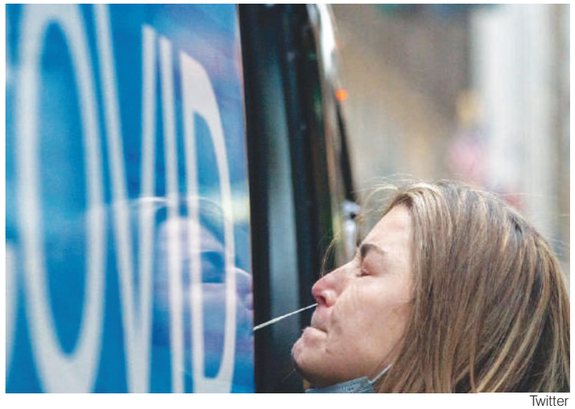
We did produce vaccines before the end of 2020, in record time I might add.
Reality: Vaccine research for possible pandemics is a continuing effort going back decades. US government money speeded things up.

Blue state lockdowns didn't work.
Reality: Evidence is clear that it worked as well or better than herd immunity. Sweden herd efforts proved this conclusively. ▶

Schools should be opened.
Reality: Current rate of youngsters getting Omicron Covid virus suggests this is a decision for health professionals.

Critical Race Theory is a disaster for our schools and our Country.
Reality: This is taught at college and graduate school level. It is also called honest history.

The "culture war" offensive includes startlingly different views of the economy. The Republicans say it is about to crash. The Democrats point out that it is booming, but a lot of people don't want their old low paying jobs and businesses have been reluctant to increase wages. The Biden plan to help middle and lower class Americans would be a huge benefit to West Virginian, a chronically distressed state and yet the senator from there, Joe Manchin, a conservative Democrat with a yen for the spotlight has refused his vote to make certain plans pass in the Senate. "We are tackling the tough problems of the economy and the pandemic. They seek only to win power and will say or do anything to achieve that," said New York Congressman Sean Patrick Maloney, chair of the Democratic Congressional Campaign Committee.


Twitter

One thing that fits perfectly in a culture-based war is to claim that personal liberty exceeds community responsibility—and so the entire vaccine and mask approach to beating the pandemic has been obstructed. Almost all the deaths from the current Omicron wave of Covid have been unvaccinated people. Republicans are speaking to their base, which is disproportionately unvaccinated. In legal challenges, Republican leaders argue that the vaccine mandates will worsen the nation's supply chain problems and exacerbate labour shortages that have arisen during the pandemic. No surprise in analysis done by National Public Radio that the stronger a county's support for Trump in the 2020 election, the lower its Covid-19 vaccination rate. Republicans are asking the ultimate sacrifice: opposition to vaccine mandates stated in terms of personal liberty may cause death, but might help Trump.

A culture-based war claims that personal liberty exceeds community responsibility. And therefore the entire vaccine and mask approach to beating the pandemic has been obstructed by Republicans.

A select bi-partisan committee in the House of Representatives is holding hearings and gathering evidence from witnesses. Some Trump team players have refused to appear and are being charged with criminal contempt of Congress. The committee is continually explaining what it has learned about the intricate but naive planning that went into the January 6 events around the formal certification of Biden's win.

Trump, from his Mar a Lago estate and club in Florida, keeps issuing emails which attack Democrats while generally refusing to discuss the January 6 events in any detail. The same is true for most Republicans in Congress. However, some of his former administration advisers in books they have written make it clear that there was a plan to disrupt the usual Congressional approval of the presidential results.

In mid-December, I received this email about some future announcement from the former president, who is clearly missing his use of twitter. Read and unpack the obvious contradictions inherent, let alone the lack of proper verb tenses.

"You have always been an incredible Patriot who has been by my side, Friend. That's why I'm giving you my trust. The ONLY way to find out about this EPIC announcement is by joining my **Official Trump Announcement Priority List**, *but I was just told your name isn't on it*.

Friend, you have the opportunity to be the first to know about this major announcement but you need to hurry. You ONLY have until MIDNIGHT TONIGHT to join my **Official Trump Announcement Priority List**. *When you make a donation of ANY AMOUNT, you'll automatically get your name at the TOP of the Official Trump Announcement Priority List."

About 50 of the more than 720 people charged in the Capitol invasion and destruction have been found guilty, although punishments have tended to be lenient despite the deaths and millions of dollars in damages. Lawyers are finding plenty of work on all sides of this conflict.

Relentless is the right word for what is happening: Oppressively constant, incessant. Not all of it comes from Trump and from well-funded right wing organisations. A good bit of it apparently is inspired by foreign nations whose intelligence agency outreach is designed to help in destabilising American life. ■

—The writer has worked in senior positions at The Washington Post, NBC, ABC *and* CNN *and also consults for several Indian channels*

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